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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

ARTHUR ANDERSEN & CO.
Petitioner

v.

DAVID S. STEWART and
CHANNING SECURITIES, INC.
Respondents

ARTHUR ANDERSEN & CO.
Petitioner

v.

JULES SANDERS and MADALYNN SANDERS
Respondents

AND THREE OTHER ACTIONS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Arthur Andersen & Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in these consolidated cases on January 22, 1980, petition for rehearing denied on February 19, 1980. The respondents are the plaintiffs and named class representatives in the two actions below in which the District Court has made a class action determination.

OPINION BELOW

In the Appendix attached hereto is set forth the opinion and judgment of the United States Court of Appeals for the First Circuit in which it dismissed petitioner's consolidated appeals from an order and an Order and Final Judgment of the District Court for the District of Massachusetts in *In Re Viatron Computer Systems Corporation Litigation*, No. 79-1351, No. 79-1452 (Jan. 22, 1980) (*App.* 1-8). The decision is officially reported at 614 F.2d 11 (1st Cir. 1980). A petition for rehearing was denied by the Court of Appeals without opinion (*App.* 9). There is no opinion of the District Court.

JURISDICTION

These appeals came before the Court of Appeals under 28 U.S.C. § 1291 and the collateral order doctrine articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The judgment of the Court of Appeals for the First Circuit was entered on January 22, 1980, and a timely petition for rehearing was denied by the Court of Appeals on February 19, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. When individual class members in a class action for damages are for the first time specifically identified after an initial class notice is mailed, but prior to trial, does not Fed. R. Civ. P. 23(c)(2) and due process require the District Court to direct individual notice to these newly identified class members of the right of each to intervene in the action or to exclude himself from the class?

2. May the failure to object to an initial notice to the class be used to estop a defendant from thereafter asserting that class members identified after the initial notice but prior to any disposition on the merits must be provided

with individual notice of their rights to intervene in the action or to exclude themselves from the class as mandated by Fed. R. Civ. P. 23(c)(2)(A)(B)(C)?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provision involved is the due process clause of the Fifth Amendment to the Constitution of the United States (*App.* 9). The rule setting forth the mandatory notice to be provided to class members in class actions for damages is Rule 23(c)(2)(A)(B)(C), Fed. R. Civ. P. (*App.* 11), and Rule 23 in general (*App.* 10-12). These provisions are reproduced in the attached appendix submitted herewith.

STATEMENT OF THE CASE

The petitioner Arthur Andersen & Co. ("Andersen") is an auditing and accounting firm named as a defendant in actions brought by the named plaintiffs pursuant to Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, and § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and S.E.C. Rule 10b-5 promulgated pursuant thereto, in which plaintiffs seek damages on behalf of themselves and all purchasers of the common stock and convertible subordinated debentures issued by Viatron Computer Systems Corporation ("Viatron"). These actions were commenced in 1971 following the filing of a petition in bankruptcy by Viatron and have been consolidated in the District of Massachusetts by the Judicial Panel on Multidistrict Litigation for coordinated pretrial discovery pursuant to 28 U.S.C. § 1407(a).

In 1974, the District Court determined that two of the actions could be maintained as class actions for damages under Rule 23(b)(3), Fed. R. Civ. P., on behalf of the Viatron common stock and debenture purchasers, respectively,

and directed that a joint notice of pendency of the class actions be mailed to the Viatron common stock and debenture purchasers as appearing on the records of Viatron's transfer agent (*App.* 13-16). These orders, issued under Rule 23(c)(1) and (c)(2), Fed. R. Civ. P. (*App.* 10-11), did not direct any individual notice to those class members who had purchased Viatron securities for which record title was held in "street names" by brokerage houses, banks, and other entities as nominees of the purchasers (*App.* 13, 16).[1] (These latter class members are hereafter referred to as the "beneficial purchasers" of Viatron securities.) No proof of any service of the 1974 notice on any beneficial purchasers has been presented to or filed with the District Court.

In November of 1978, and prior to any trial or judgment, the plaintiff class representatives entered into a stipulation of settlement with the defendants who were the underwriters of Viatron's securities offerings. The underwriters agreed to provide to plaintiffs the names and addresses of beneficial purchasers for whom the underwriters had acted

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[1] The holding of securities in "street names" refers to the practice whereby a brokerage house, bank or other entity registers in its name securities purchased and owned by others. Under the practice, the brokerage house, bank or other entity is known as the record holder of the security, and the actual purchaser and owner of the security is known as the beneficial purchaser or beneficial owner. *See generally Final Report of the Securities and Exchange Commission of the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other than the Name of the Beneficial Owner of Such Securities Pursuant to Section 12(m) of the Securities Exchange Act of 1934,* CCH Sec. L. Reps. No. 672 (Dec. 15, 1976). *See also In Re Franklin National Bank Securities Litigation,* 574 F.2d 662, 673 (2d Cir. 1978), *modified on other grounds* 599 F.2d 1109 (2d Cir. 1979). Under this Court's holding in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), *reh. denied* 423 U.S. 864 (1975), the actual class members in an action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), are the persons who suffered a loss in connection with a purchase or sale of securities, which would be the beneficial purchasers of those securities rather than those holding record title in "street names" as nominees of the purchasers.

as nominees, so that plaintiffs could give individual notice of this partial settlement and a proof of claim form to the underwriters' customers who fell within the classes as defined in 1974. Plaintiffs also proposed to obtain the cooperation of brokerage houses, banks and other entities serving as nominees of beneficial purchasers, so as to provide other beneficial purchasers with individual notice of the partial settlement and a proof of claim form, by compensating these non-party nominees for their expenses in identifying their beneficial purchaser customers. In response, petitioner Andersen asserted that individual notice had not previously been directed to any beneficial purchaser class members and that all of the beneficial purchasers whose identity could be ascertained through reasonable efforts must, under this Court's intervening decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), be provided with individual notice of their rights as class members to intervene in the action or opt out of the class, in conformance with Rule 23(c)(2)(A)(B)(C).

Andersen's argument that identifiable beneficial purchasers must be provided with individual notice of their rights to intervene or opt out was rejected by the District Court. In an order under date of May 7, 1979 (*App.* 17), the District Court directed individual notice to the beneficial purchasers of the partial settlement, but the notice (*App.* 20) was devoid of any reference to beneficial purchaser class members having a right or an opportunity to intervene in the action or to exclude themselves from the classes. The District Court refused to provide the beneficial purchasers with notice of their rights as class members as required by Rule 23(c)(2)(A)(B)(C) despite its finding that the criterion under Rule 23(c)(2) mandating the giving of such notice were established. Specifically, in directing individual notice of the partial settlement, the standard employed by the District Court for the giving of such notice was the reasonable efforts standard of Rule 23(c)(2), Fed. R. Civ.

P., *viz.*, that the partial settlement notice was to be mailed to the "reasonably available names and addresses of beneficial purchasers for whom [the underwriters] acted as nominees," and to such additional beneficial purchasers as plaintiffs' counsel could identify through "such reasonable steps as the Court determines are necessary. . ." (*App.* 19).

Counsel for plaintiffs filed various reports and affidavits with the District Court with respect to identifying and providing individual notice of the partial settlement to in excess of 4,600 beneficial purchasers (*App.* 22), including 1,592 beneficial purchaser class members identified from the records of the underwriter defendants, in addition to the 11,560 persons holding record title to Viatron securities.

Andersen's continuing objections to the notice and motions for a stay and rehearing were denied by the District Court. Andersen appealed, asserting that the District Court had committed error on a collateral matter which would not be effectively reviewable on appeal, namely, in directing individual notice to the beneficial purchasers for the first time in 1979, the District Court failed and refused to provide notice of their right to intervene or exclude themselves under Fed. R. Civ. P. 23(c)(2)(A)(B)(C). Andersen asserted it was entitled to such notice prior to judgment to assure that any judgment in Andersen's favor against the classes would be binding on the newly identified class members and to avoid being exposed to the risks of one-way intervention by these class members following judgment.

The Court of Appeals declined to consider the merits of the issues raised by Andersen and dismissed Andersen's appeals for lack of standing. It held that Andersen's standing to object and to appeal was limited strictly to the orders making the initial class action determinations and directing the initial notice to the classes in 1974, and because no objection was made or appeal taken at that time

that Andersen was now estopped to raise issues regarding the notice to be provided to class members under Rule 23(c)(2), Fed. R. Civ. P. *See App.* 5-7. Andersen's petition for rehearing was denied on February 19, 1980 (*App.* 9).

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions of Federal Law Which Should be Settled by this Court

Resolution of the issues raised in this petition will have general application in all class actions for damages and involves consideration of the policies underlying amended Fed. R. Civ. P. 23. Without adequate notice, absent class members in a class action for damages are not bound by any judgment, *Eisen* v. *Carlisle & Jacqueline* (*Eisen IV*), 417 U.S. 156, 176-177 (1974). Unless the District Court remains under a continuing duty to assure that notice is adequate and defendants are not estopped to call to the court's attention that subsequent proceedings in the District Court demonstrate that the former notice is not adequate, the underlying purpose of amended Rule 23 will be defeated. Class members who have not received adequate notice can continue to engage in "sideline sitting," and to await the results of the action before deciding whether to be bound by the proceedings, which amended Rule 23 was intended to eliminate. *See* "Notes of the Advisory Committee on Proposed Amendments to Rule 23," 39 F.R.D. 69, 98-99, 105-106 (1966); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 547 (1974), *reh denied* 415 U.S. 952 (1974).

The issue of the adequacy of the initial notice in a class action for damages will arise whenever, as in this case, the District Court subsequently directs individual notice under either Rule 23(d) or (e), Fed. R. Civ. P., which is more inclusive than the original notice. It may also arise where through oversight or neglect the Court and the parties did not provide class members with adequate or the best prac-

ticable individual notice, with the result being that identifiable class members are not bound by the proceedings. *Jones* v. *Diamond,* 594 F.2d 997, 1023 (5th Cir. 1979), *reh. granted* 602 F.2d 1243 (5th Cir. 1979); *Bogard* v. *Cook,* 586 F.2d 399, 408-409 (5th Cir. 1978), *reh denied* 591 F.2d 102 (5th Cir. 1979), *cert denied,* — U.S. —, 100 S.Ct. 173 (1979). *Note: Collateral Attack on the Binding Effect of Class Action Judgments,* 87 Harv. L. Rev. 598 (1974).

Andersen is presented with such a situation in this case. The beneficial purchaser class members first identified and provided with individual notice in 1979 were not informed in that notice or otherwise of their rights as class members to intervene in the action or to opt out of the class which this Court held to be mandatory under Fed. R. Civ. P. 23(c)(2) in *Eisen IV.* The only notice in any sense "directed" to these beneficial purchasers which purported to inform them of their right to intervene or to opt out was the 1974 notice mailed to the nominees holding record title to the securities in "street names." Since that 1974 notice, the only Circuit directly addressing the issue has held that the form of constructive notice provided in 1974 is clearly inadequate as to beneficial purchasers who can be identified through reasonable efforts. *In Re Franklin National Bank Securities Litigation,* 574 F.2d 662, 669-671 (2d Cir. 1978), *modified* 599 F. 2d 1109 (2d Cir. 1979). *See Id.,* 599 F.2d at 1110. Thus, on the record below, Andersen faces the prospect that all the beneficial purchaser class members first identified in 1979, approximately one-third of the identifiable class, will not be bound by any judgment in Andersen's favor against the class as defined by the District Court.

In this Court's decision in *Eisen IV,* the problem of adequate notice not being provided was resolved at that time by holding that inadequacies in notice are susceptible to being cured by redefining the class. 417 U.S. at 179, n. 16 (holding that dismissal of class action by reason of plain-

tiff's refusal to pay the cost of notice to all identifiable class members was without prejudice to efforts to redefine the class). *Cf. Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468-469 (1978) (holding a class action determination is inherently tentative and subject to revision prior to final judgment); *Accord: Deposit Guaranty National Bank, Jackson, Mississippi* v. *Roper*, 48 U.S.L.W. 4279, 4282 (3/19/80). However, following this Court's decision in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), the option of redefining the class so as to eliminate those members who have not been provided with adequate notice is no longer a practicable alternative. Under *Parklane Hosiery Co.*, even non-parties and persons not within the class would appear to be in a position to obtain the benefit of any findings adverse to the class action defendant by collaterally estopping the defendant in a subsequent suit. The result is in essence the same right of one-way intervention that amended Rule 23(c)(2) was intended to eliminate. Without adequate notice that is binding on class members, defendants cannot be assured of obtaining the full *res judicata* benefit of any judgment in their favor. Class members who have not received adequate notice, and similarly situated non-class members under *Parklane Hosiery Co.*, will receive the benefit of any decision adverse to the defendant whereas they will remain free to relitigate issues on which the defendant prevailed in the class action.

The proper resolution of this problem, and the only manner in which the purpose of eliminating one-way intervention can be achieved, is to require that the District Court provide adequate notice where its previous notice is demonstrably insufficient. Andersen requests that this Court hold that where the District Court finds prior to any trial or judgment or other disposition on the merits that there are additional class members who can be provided with individual notice through reasonable efforts, then such notice must be provided in the form set out in Fed. R. Civ. P.

23(c)(2)(A)(B)(C) in order to assure that the judgment will have the maximum preclusive effect consistent with due process. As is discussed below, this result is fully supported by prior decisions of this Court.

II. The Decision Below Conflicts with Decisions of this Court and of Other Circuits Regarding the Construction of Rule 23(c)(2), Fed. R. Civ. P., the Due Process Clause of Amendment V to the Constitution of the United States, and the Lack of Finality of Interlocutory Orders of the District Court

Although the Court of Appeals stated in its opinion that it found it unnecessary to consider this Court's decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), the holding of the Court of Appeals sanctioned exactly what this Court found to be impermissible under Fed. R. Civ. P. 23(c)(2) in *Eisen IV*. Following remand from the Second Circuit in *Eisen II, Eisen* v. *Carlisle & Jacquelin* (*Eisen II*), 391 F. 2d 555 (2d Cir. 1968), *reversing* 41 F.R.D. 147 (S.D.N.Y. 1966), *on remand* 52 F.R.D. 253 (1971), 54 F.R.D. 565 (1972), *reversed* 479 F.2d 1005 (2d Cir. 1973) (*Eisen III*), *vacated and remanded* 417 U.S. 156 (1974) (*Eisen IV*, the District Court had found that 2,250,000 of 6,000,000 buyers and sellers who had traded in odd lots could be identified through the parties' access and comparison of computer listings, 52 F.R.D. at 257-258. but declined to require individual notice to these individual odd-lot buyers and sellers. 52 F.R.D. at 267-268. Upon review, this Court held that individual notice to these 2,250,000 identifiable class members was mandatory, including notice of their right to intervene or to opt out under Fed. R. Civ. P. 23(c)(2)(A)(B)(C), even though plaintiffs contended that the effort and expense of providing individual notice would be so burdensome as to defeat the class action. 417 U.S. at 175. Prior to the decision in *Eisen IV,* this Court had held,

even apart from the express requirements of Fed. R. Civ. P. 23(c)(2), that forms of notice other than individual notice are not sufficient under the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States with respect to those persons whose names and addresses are known or are ascertainable through reasonable efforts. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-320 (1950); *Schroeder* v. *City of New York*, 371 U.S. 208, 212-213 (1962).

In this case, the District Court determined in 1979 that in excess of 4,600 beneficial purchasers could be and were identified through reasonable efforts and that the individual notice of the partial settlement provided to these beneficial purchasers in 1979 was "the best notice practicable." (*App.* 19) However, it also declined in 1979 to provide these beneficial purchasers with notice of their right to intervene or to opt out, as required by Fed. R. Civ. P. 23(c)(2)(A)(B)(C), even though in 1974 the District Court had not directed that any individual notice be provided to these class members. Thus, on the record below, the same as in *Eisen IV*, the District Court has determined that class members are identifiable and has declined to direct individual notice to these class members of their rights under Fed. R. Civ. P. 23(c)(2).

The Court of Appeals in its opinion found it unnecessary to consider the application of this Court's holding in *Eisen IV* because in its view a defendant may raise issues regarding the adequacy of notice pursuant to Rule 23(c)(2), Fed. R. Civ. P., only when the initial class determination is made. Thus, the Court of Appeals concluded that Andersen's standing to object did not extend beyond the 1974 order approving the initial notice, and because no objection was made or appeal taken at that time, Andersen is now estopped to assert or to appeal that the initial class notice had not been directed to all identifiable class members in conformance with Rule 23(c)(2). *See App.* 5-7. No author-

ity was cited by the Court of Appeals in support of this "estoppel" conclusion, and we know of none.

This reasoning and holding of the Court of Appeals is in direct conflict with the principles articulated in applicable decisions of this Court and of decisions of other Circuits. Prior to entry of judgment, the District Court has complete power to revise its orders and to correct any error. *Marconi Wireless Telegraph Co. of America* v. *United States,* 320 U.S. 1, 47-48 (1943), *reh. denied* 320 U.S. 809 (1943); *John Simmons Co.* v. *Grier Bros. Co.,* 258 U.S. 82, 88-91 (1922)[2] *Cf. Coopers & Lybrand* v. *Livesay,* 437 U.S. at 468, 469 (class action determinations are subject to revision prior to judgment); 7 Moore's Federal Practice, ¶¶ 60.16[4], 60.20 (1979). A District Court's interlocutory orders are not viewed as final, and no appeal is required, until judgment has been properly entered. *United States* v. *Indrelunas,* 411 U.S. 216, 219-221 (1973); *Bankers Trust Co.* v. *Mallis,* 435 U.S. 381, 384-385 (1978), *reh denied* 436 U.S. 915 (1978); 9 Moore's Federal Practice, ¶ 110.18 [1980].[3] When an issue is raised for reconsideration either

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[2] *Accord: Hodgson* v. *United Mine Workers of America,* 473 F.2d 118, 125, n. 38 (D.C. Cir. 1972); *Acha* v. *Beame,* 570 F.2d 57, 63 (2d Cir. 1978); *Braden* v. *University of Pittsburgh,* 552 F.2d 948, 954-955 (3d Cir. 1977); *United States* v. *Jerry,* 487 F.2d 600, 604-605 (3d Cir. 1973); *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858, 862 (5th Cir. 1970); *Cohn* v. *United States,* 259 F.2d 371, 376 (6th Cir. 1958); *Chicago Housing Tenants Organization, Inc.* v. *Chicago Housing Authority,* 512 F.2d 19, 22 (7th Cir. 1975); *Transportation-Communication-Division Brotherhood* v. *St. Louis-San Francisco RR Co.,* 419 F.2d 933, 935 (8th Cir. 1969), *cert. denied* 400 U.S. 818 (1970); *Pruseau* v. *Prudential Ins. Co. of America,* 591 F.2d 74, 79 (9th Cir. 1979); *United States* v. *Desert Gold Mining Co.,* 433 F.2d 713, 715 (9th Cir. 1970).

[3] An order of the District Court does not even have the practical finality for interlocutory review pursuant to 28 U.S.C. 1291 and the collateral order doctrine articulated in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), unless no further consideration of the order is likely by the District Court, *e.g., Coopers &*

before or after final judgment, the court is bound to view the issue in light of the facts that are available at that time. *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U.S. 238, 247-250 (1944). As ruled by the District of Columbia Circuit Court of Appeals:

> "Where, as here, a court's ruling has discretionary elements based on circumstances which are subject to alteration, the law recognizes the power and responsibility of the court to reconsider its ruling if a material change in circumstances has in fact occurred." *Hodgson* v. *United Mine Workers of America,* 473 F.2d 118, 125 (D.C. Cir. 1972).

The traditional lack of preclusive effect afforded to prejudgment orders of the District Court applies with even greater force to orders directing notice to class members pursuant to Rule 23(c)(2), Fed. R. Civ. P. The issue of the adequacy of notice can never be foreclosed, since the issue can always be raised by absent class members in a collateral attack upon the judgment. *Eisen IV,* 417 U.S. at 176-177; "Notes of the Advisory Committee on Proposed Amendments to Rule 23," 39 FRD 69, 106 (1966). The requirements of the rule are mandatory and are not capable of

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Lybrand v. *Livesay,* 437 U.S. at 477, n. 30 (1978) (the order must have "disposed of" an unsettled issue of national significance); *United States* v. *MacDonald,* 435 U.S. 850, 853-858 (1978); *Abney* v. *United States,* 431 U.S. 651, 659 (1977); *Eisen IV,* 417 U.S. at 171. The 1974 orders lacked even this practical finality. They were by their terms conditional (*App.* 14, 16), entered without objection, and no motion for rehearing or to revise the orders was made or denied until 1979, when the District Court overruled Andersen's objections and declined to direct individual notice to the newly identified beneficial purchasers in conformance with Rule 23(c)(2)(A)(B)(C), Fed. R. Civ. P. In 1979, the District Court further entered judgment dismissing as against the underwriter defendants all claims of the members of the classes as defined in 1974 (*App.* 24-25), and thereby determined the composition of the classes for all purposes of this litigation, including the continuing litigation against Andersen, in disregard of the deficiency in the notice provided to the beneficial purchasers.

being "waived."[4] Because Andersen has standing to raise issues regarding the adequacy of notice to assure that it receives the full *res judicata* benefit of any judgment in its favor, *Oppenheimer Fund, Inc.* v. *Sanders,* 437 U.S. 340, 361, n. 30 (1978); *Bersch* v. *Drexel Firestone, Inc.,* 519 F.2d 974, 996 (2d Cir. 1975), *cert. denied sub nom Bersch* v. *Arthur Andersen & Co.,* 423 U.S. 1018 (1975), its standing must necessarily extend to the very situation where the notice to the class has become demonstrably inadequate.

Every aspect of the analysis and decision of the Court of Appeals conflicts with prior rulings by this Court and other Circuits. These conflicts justify the grant of certiorari to review the judgment below.

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[4] Mr. Justice Powell, speaking for the Court in *Eisen IV,* 417 U.S. at 176, stated that neither the District Court nor the parties may waive the requirements of Fed. R. Civ. P. 23(c)(2):

> "[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23."

More recently, this Court advanced a general policy of encouraging defendants in class actions to advance arguments appropriate to the rights of absent class members, and to the rights of those defendants, while reiterating that the duty to direct adequate notice in compliance with Fed. R. Civ. P. 23(c)(2) rests primarily upon the District Court. *Oppenheimer Fund, Inc.* v. *Sanders,* 437 U.S. 340, 354, n. 21, 360 (1978).

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the First Circuit, that judgment and opinion should be reversed, and this cause should be remanded with instructions to provide individual notice to the identifiable beneficial purchaser class members in conformance with Rule 23(c)(2)(A)(B)(C) of the Federal Rules of Civil Procedure.

Respectfully submitted,

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May 5, 1980

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United States Court of Appeals

FOR THE FIRST CIRCUIT

Nos. 79-1351
79-1452

IN RE
VIATRON COMPUTER SYSTEMS
CORPORATION LITIGATION

ARTHUR ANDERSEN & CO.,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOSEPH L. TAURO, *U.S. District Judge*]

BEFORE COFFIN, *Chief Judge,*
BOWNES, *Circuit Judge,*
CLARKE, JR., *District Judge.**

George H. Lewald, with whom *Thomas G. Dignan, Jr., William F. McCarthy, Steven T. Hoort, Ropes & Gray, Charles W. Boand,* and *Wilson & McIlvaine* were on brief for appellant.

Jared Specthrie, with whom *Stephen Moulton, Jerome M. Congress, Craig L. Tessler, Milberg, Weiss, Bershad & Specthrie,* and *Moulton & Looney* were on brief, for appellees.

January 22, 1980

COFFIN, *Chief Judge.* This appeal arises from five consolidated class actions brought on behalf of the purchasers of certain securities of Viatron Computer Systems Corp.

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* Of the Eastern District of Virginia, sitting by designation.

(Viatron), a Massachusetts corporation, after the filing of a bankruptcy petition by Viatron in 1971. Read together, the complaints allege violations of Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), in the issuance of documents which were allegedly materially misleading with respect to Viatron's prospects for survival. Among those named as defendants are Viatron's officers and directors, the underwriters of its convertible subordinated debenture and stock offerings, a consulting and engineering firm retained by the underwriters in connection with their due diligence inquiries, and the appellant, Arthur Andersen & Co. (Andersen), an auditing and accounting firm which certified the financial statements in the prospectus.

Following certification of two classes pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, a joint notice of pendency of the class actions was approved by the court and mailed to all transferees of record of the relevant Viatron securities in April of 1974. The notice was also published in the *Wall Street Journal.* Since the mailed notice approved by the district court was delivered only to transferees of record, it was not sent directly to class members who were beneficial purchasers of Viatron securities, that is, who purchased securities for which the record title was held in the "street names" of nominee brokerage houses, banks and other entities.[1] Instead, the court order provided that additional copies of the notice could be obtained by the street name nominees for forwarding to beneficial purchasers. At the time that the court approved this notice, appellant Andersen explicitly approved both its form and method of distribution.

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[1] For a more detailed description of the "street name" phenomenon, *see In Re Franklin National Bank Securities Litigation,* 574 F.2d 662, 664 n.2, 673 (2d Cir. 1978) *modified,* 599 F.2d 1109 (2d Cir. 1979).

Five years later, after extensive discovery consisting of substantial document production as well as over one hundred days of depositions, counsel for the plaintiffs and the underwriter defendants agreed to a proposed settlement, subject to court approval, whereby the underwriters would pay $1,850,000 to be divided by the two main classes in full satisfaction of any liability which the underwriters might have. Counsel for the plaintiffs then applied to the district court for approval of both the settlement and the proposed method of distributing notice of it to the class members.

The method proposed for sending notice of the partial settlement to the class members was similar to that employed in distributing the 1974 notice in that it provided for mailing of individual notice to all transferees of record. It differed, however, in that the individual notices to be mailed to street names who might be nominees for unknown beneficial purchasers included a request that the nominee either forward copies of the notice to the beneficial purchasers or provide plaintiffs' counsel with their names and addresses. Plaintiffs' counsel further proposed that the settling underwriter defendants who held record title as nominees be directed by the court to submit "reasonably available" names and addresses of their beneficial purchaser customers, who could then be provided with individual notice.

On May 4, 1979, the district court held a hearing for the purpose of determining whether it should approve the partial settlement and notice pursuant to Rule 23(e). At this hearing, appellant Andersen objected to the proposed notice and method of distribution. In particular, Andersen claimed that the beneficial purchasers were entitled to individual notice and that the proposed method of notifying them was not the "reasonable effort" required by Rule 23, as interpreted in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974) (*Eisen IV*). Andersen also claimed that the contents of the notice were inadequate.

The district court rejected Andersen's arguments and approved the proposed notice of partial settlement. The court did, however, order that the plaintiffs' counsel "shall take such reasonable steps as the court determines are necessary to identify and provide notice to beneficial purchasers and shall periodically report to the court thereon."[2] Andersen still regarded the order as unsatisfactory and brought this appeal.

Determining what efforts are required in order to attempt to provide notice to beneficial purchasers of securities held by street name nominees is far from a simple exercise. The only appellate court to attempt to make such a determination found that "reasonable efforts" must be made to send individual notice to such purchasers, *see In Re Franklin National Bank Securities Litigation,* 574 F.2d 662, (2d Cir. 1978) (*Franklin I*), *modified,* 599 F.2d 1109 (2d Cir. 1979) (*Franklin II*).

In this particular case, however, we need not reach the notice issue. Plaintiffs-appellees argue that Andersen does not have standing to appeal the court order approving the settlement notice and agreement. We find this argument persuasive and dispositive of this appeal.[3]

A nonsettling defendant does not ordinarily have standing to object to a court order approving a partial settlement since the nonsettling defendant is generally not affected by the settlement. *In Re Beef Industry Antitrust Litigation,* Nos. 78-3345-46 and 79-1010, slip op. at 1372 (5th Cir.

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[2] Pursuant to this order, plaintiffs' counsel twice mailed to the nominees letters requesting the names and addresses of beneficial purchasers and offering to pay the reasonable costs which the nominees might incur in complying with the request.

[3] Appellees also contend that the 1979 order is not appealable under the collateral order doctrine. In light of our holding that Andersen does not have standing to appeal the order, we do not address this issue.

Nov. 26, 1979); *Seiffer* v. *Topsy's Int'l, Inc.*, 70 F.R.D. 622, 631 n.11 (D. Kan. 1976); 3 Newberg on Class Actions § 5660b at 564-65 (1977). In this case, Andersen seeks to avoid this general rule by limiting its objections to the method of distribution and form of the notice, rather than the actual merits of the settlement. With regard to the notice and its method of distribution, Andersen asserts two reasons in support of its claim that it has standing.

First, Andersen notes that upon completion of this suit, it will be able to raise a res judicata bar to any future proceedings brought against it on the same issues by class members. *See Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir.), *cert. denied sub nom Bersch* v. *Arthur Andersen & Co.*, 423 U.S. 1018 (1975). If the notice to class members is deficient, however, then those members of the class who should have been given notice of the prior suit but were not might avoid the preclusive effect of this suit. *See Bogard* v. *Cook*, 586 F.2d 399, 408-09 (5th Cir. 1978). *See generally*, Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974). Thus, Andersen argues, if it is correct in its claim that the notice of partial settlement is deficient, it might lose the ability to protect itself against similar subsequent suits.

The defect in Andersen's argument is that a Rule 23(e) notice of partial settlement is not intended to serve as a Rule 23(c)(2) notice of the pendency of the suit. The Rule 23(c)(2) notice of pendency, issued in 1974, with its options for opting out, is the basis on which Andersen can subsequently raise its claims of preclusion. This notice was required, whether or not any settlement was contemplated. If the 1974 notice was adequate, and Andersen subsequently prevails in the litigation, it will receive the full preclusive effect of its victory whether or not the notice of partial settlement was even sent, much less sent properly.

Thus, Andersen's interest in maximizing the preclusive effect of any victory which it might achieve only establishes that it has standing to challenge the 1974 notice. While it is perhaps possible that the 1979 notice of partial settlement might have had the incidental effect of curing any defects in the 1974 notice, and thus Andersen can arguably claim to be "harmed" by the alleged failure of the 1979 notice to have had such an effect, we think this insufficient reason to allow Andersen to bootstrap its complaints with the 1974 notice into an attack on the 1979 notice of partial settlement. This is certainly not a case in which the two notices are in fact a single notice, *compare In Re Beef Industry Antitrust Litigation, supra* at 1373, *with In Re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1093 (5th Cir. 1977). Since Andersen did not object to the 1974 notice, it clearly had no right to assume that there would be a settlement five years later which might cure any defects in the 1974 notice. Once such a settlement in fact occurred, the process of finalizing it is best left to the court and the parties who are a part of it.

The second argument which Andersen raises in support of its claim of standing is that by granting it standing, we would insure that the absent members of the plaintiff class would have a surrogate to protect their rights to receive proper notice. With regard to the notice of partial settlement, however, the settling defendants have a much greater interest than does Andersen in assuring that the notice is proper, for they stand to lose the preclusive effect of the settlement if it is not. Moreover, the district court itself has an independent obligation to insure that the notice of settlement is proper. Fed.R. Civ. P. 23(e); *see* Note, *supra* at 602-03 n.72. Since the absent class members are thus not without protection, any additional benefits which might stem from allowing Andersen also to speak on their behalf are minimal and, we hold, are outweighed by the unnecessary frustrations of the settlement process — which itself is "highly favored in the law", *D. H. Overmeyer Co.* v. *Lof-*

lin, 440 F.2d 1213, 1215 (5th Cir. 1971) — that might result from the participation of a nonsettling defendant.

Finally, we note that Andersen cannot now appeal the court order approving the 1974 notice. If Andersen had objected to the 1974 notice in the district court when it was proposed, then perhaps Andersen could have immediately appealed the 1974 order approving the notice since it might have been final under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Corp.,* 337 U.S. 541 (1949), *cf. Eisen IV, supra* (order imposing costs of notice on defendants final). Moreover, if Andersen had objected in 1974, it might have even been possible to entertain an appeal concerning the order after final judgment is rendered in the case as a whole if the finality of the 1974 order under *Cohen* were in fact unclear, *cf. Drayer* v. *Krasner,* 572 F.2d 348, 353 n.6 (2d Cir. 1978) (Query whether a party against whom a *Cohen*-type final order was rendered but excusably failed to recognize it to be such should be precluded from questioning it on appeal from the truly final judgment . . ..")

Andersen, however, did not even object to the 1974 order until 5 years later after extensive discovery had passed, and it is not in the position of being able to proffer any excuse for its long delay in recognizing what it now claims to be a major defect in the 1974 notice, since the primary authority for its attack on the notice is the *Eisen IV* decision of 1974.[4] We therefore hold that Andersen has no standing to appeal the district court's 1979 order and is estopped from appealing the 1974 order.

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[4] Andersen also relies on the *Franklin I* decision; however, that was decided a full year before Andersen voiced any complaints.

United States Court of Appeals

FOR THE FIRST CIRCUIT

Nos. 79-1351
79-1452

IN RE
VIATRON COMPUTER SYSTEMS
CORPORATION LITIGATION

ARTHUR ANDERSEN & CO.,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: January 22, 1980

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The appeals are dismissed in accordance with the opinion filed this day.

By the Court:

DANA H. GALLUP

Clerk.

United States Court of Appeals

FOR THE FIRST CIRCUIT

Nos. 79-1351
79-1452

IN RE
VIATRON COMPUTER SYSTEMS
CORPORATION LITIGATION

ARTHUR ANDERSEN & CO.,
DEFENDANT, APPELLANT.

ORDER OF COURT

Entered: February 19, 1980

It is ordered that the petition for rehearing filed on February 5, 1980 be, and the same hereby is, denied.

By the Court:

DANA H. GALLUP
Clerk.

AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine

by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class

or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JULES SANDERS, ET AL v. EDWARD M. BENNETT, ET AL	CIVIL ACTION No. 73-2594-T MDL-138 DOCKETED

MEMORANDUM AND ORDER

TAURO, D. J.

* * *

Accordingly, a class action is hereby maintained under Rule 23(b)(3) of the Federal Rules of Civil Procedure, said class to consist of all persons (which means individuals, corporations, partnerships, associations, joint stock companies, trust[*sic*] and unincorporated associations) who acquired or purchased shares of Viatron Computer Systems Corporation Common Stock during the period commencing December 23, 1969 and ending April 29, 1971. The names and addresses of members of the class to the extent presently ascertainable appear on the list of record holders furnished by First National City Bank, New York, the transfer agent for the Common Stock of Viatron Computer Systems Corporation.

Notice to the class, in the form annexed and marked Appendix B, shall be given by the clerk of this Court to the class pursuant to Rule 23(c)(2). Said notice shall be given to each member of the class as follows:

1. By depositing in the United States Mail, postage prepaid, on or before April 15, 1974, notice in said form as annexed, addressed to all transferees of record from December 23, 1969 to and including April 29, 1971, as shown on the list of record holders described above.

2. By publication of said notice on or before April 15, 1974, once in all editions of the *Wall Street Journal* of that day.

This Court finds that the within form of notice annexed and the giving of same are the best practicable under the circumstances.

The cost of notice by mailing as ordered in subparagraph 1 hereof, and the expense of notice by publication as ordered in subparagraph 2 hereof, shall be advanced by the plaintiffs subject to reimbursement pursuant to the provisions of Rule 54(d) of the Federal Rules of Civil Procedure for the United States District Courts. Proof of said mailing and publication shall be filed in this Court on or before .

This Order may from time to time be altered or amended under Rule 23(c)(1) *inter alia,* so as to divide the class into sub-classes where necessary and appropriate, and is without prejudice to any motion to modify or withdraw the class action determination.

J. L. TAURO

Dated: 2/26/74

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: VIATRON COMPUTER SYSTEMS CORPORATION (David S. Stewart, et al., v. Edward M. Bennett, et al.)	DOCKETED MDL-138 (71-3022-T)

MEMORANDUM AND ORDER

TAURO, D. J.

* * *

Accordingly, a class action is hereby maintained under Rule 23(b)(3) of the Federal Rules of Civil Procedure, said class to consist of all persons (which means individuals, corporations, partnerships, associations, joint stock companies, trusts and unincorporated associations) who acquired or purchased Viatron Computer Systems Corporation 6¼% Convertible Subordinated Debentures due December 1, 1989, during the period commencing December 23, 1969, through December 17, 1971, the date upon which the Complaint in this action was filed. The names and addresses of members of the class to the extent presently ascertainable appear on the list of record holders certified by the Indenture Trustee of the aforesaid Viatron Computer Systems Corporation Debentures which shall be furnished the Clerk of Court and marked as Appendix A on or before March 22, 1974.

Notice to the class, in the form annexed to this order and marked Appendix B, shall be given by the Clerk of this Court to the class pursuant to Rule 23(c)(2). The said notice shall be given to each member of the class as follows:

1. By depositing in the United States mail, postage prepaid, on or before April 15, 1974, notice in the form annexed, addressed to all holders of record from December 23, 1969, through December 17, 1971, as certified by the Indenture Trustee, The First National Bank of Boston.

2. By publication of said notice on or before April 15, 1974, once in all editions of the Wall Street Journal of that day.

This Court finds that the within form of notice annexed and the giving of same are the best practicable under the circumstances.

The cost of notice by mailing as ordered in subparagraph 1 hereof, and the expense of notice by publication as ordered in subparagraph 2 hereof, shall be advanced by the plaintiffs subject to reimbursement pursuant to the provisions of Rule 54(d) of the Federal Rules of Civil Procedure for the United States District Courts. Proof of said mailing and publication shall be filed in this Court on or before .

This Order may from time to time be altered or amended under Rule 23(c)(1) *inter alia,* so as to divide the class into sub-classes where necessary and appropriate, and is without prejudice to any motion to modify or withdraw the class action determination.

J. L. TAURO

Dated: 2/26/74

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOCKETED

IN RE VIATRON COMPUTER SYSTEMS CORPORATION LITIGATION	M.D.L. #138
DAVID STEWART, ET AL., *Plaintiffs,* — against — EDWARD M. BENNETT, ET AL., *Defendants.*	CIVIL ACTION No. 71-3022-T
	ORDER
JULES SANDERS, ET AL., *Plaintiffs,* — against — EDWARD M. BENNETT, ET AL., *Defendants.*	CIVIL ACTION No. 73-2594-T

WHEREAS, on February 26, 1974, *David Stewart* v. *Edward M. Bennett,* No. 71-3022-T *("Stewart"),* was ordered to proceed as a class action on behalf of all persons who acquired or purchased convertible subordinated debentures of Viatron Computer Systems Corporation ("Viatron") during the period from December 23, 1969 through December 17, 1971, and *Jules Sanders* v. *Edward M. Bennett,* No. 73-2594-T ("Sanders"), *(Stewart* and *Sanders* are collectively referred to as the "Actions"), was ordered to proceed as a class action on behalf of all persons who acquired or purchased common stock of Viatron during the period from December 23, 1969 through April 29, 1971;

• • •

WHEREAS, members of the *Stewart* and *Sanders* classes were given notice of the pendency of said Actions;

WHEREAS, the plaintiffs herein have entered into and filed a Stipulation of Settlement dated November 29, 1978 settling the claims asserted in these actions by the named plaintiffs herein on behalf of themselves and the classes certified herein as against the underwriter defendants and reserving the right of the plaintiffs and the classes to continue the actions against the non-settling defendants;

* * *

WHEREAS, the Stipulation of Settlement has been presented to the Court, after due deliberation, It Is Hereby ORDERED:

1. A hearing (the "Hearing") shall be held before this Court on Aug. 15, 1979 at 11:00 o'clock A.M., in Room , in the United States Courthouse, 1525 John W. McCormack Building, Boston, Massachusetts, for the purpose of determining, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, whether the partial settlement of these actions, as set forth in the Stipulation, should be approved as being fair, reasonable and adequate and in the best interest of the members of the classes in these Actions; and for the purpose of hearing petitions for interim allowance for expenses.

2. (a) On or before July 5, 1979, notice of the hearing on the proposed partial settlement, substantially in the form annexed hereto as Exhibit 1, with the Proof of Claim form annexed thereto, shall be caused to be mailed by Messrs. Milberg Weiss Bershad & Specthrie, and Messrs. Moulton and Looney, by first class mail, to all class members to whom the Notice of Class Determination was mailed by them pursuant to this Court's order dated February 26, 1974, at the last known addresses of

said class members appearing on the books of Viatron or its transfer agent;

(b) On or before June 27, 1979, the underwriters listed in Schedule A to the Stipulation of Settlement (who appear as record purchasers on the books of Viatron or its transfer agent) will provide plaintiffs with a list of the reasonably available names and addresses of beneficial purchasers for whom said firms acted as nominees during the class period and Messrs. Milberg Weiss Bershad & Specthrie and Messrs. Moulton and Looney shall cause notice to be mailed by first class mail to such beneficial purchasers;

(c) Plaintiffs shall take such reasonable steps as the Court determines are necessary to identify and provide notice to beneficial purchasers and shall periodically report to the Court thereon.

3. On or before July 5, 1979, notice of the hearing on the proposed partial settlement, substantially in the form annexed hereto as Exhibit 2, shall be caused to be published once in the National Edition of the Wall Street Journal.

4. Notice given in accordance with this Order meets the requirements of Rule 23 of the Federal Rules of Civil Procedure and is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto.

* * *

Dated: Boston, Massachusetts
May 7, 1979

J. L. TAURO
U.S.D.J.

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT FOR
DISTRICT OF MASSACHUSETTS
1525 John W. McCormack Building
Boston, Massachusetts 02109

NOTICE OF PARTIAL SETTLEMENT TO ALL PERSONS WHO (A) ACQUIRED OR PURCHASED DEBENTURES OF *VIATRON COMPUTER SYSTEMS CORPORATION* DURING THE PERIOD COMMENCING DECEMBER 23, 1969, THROUGH DECEMBER 17, 1971, or (B) ACQUIRED OR PURCHASED COMMON STOCK OF *VIATRON COMPUTER SYSTEMS CORPORATION* DURING THE PERIOD COMMENCING DECEMBER 23, 1969, THROUGH APRIL 29, 1971.

You are hereby notified pursuant to an Order of the United States District Court for the District of Massachusetts entered May 7, 1979.

* * *

INSTRUCTIONS TO NOMINEES

Counsel for the plaintiffs is attempting to obtain the name(s) and address(es) of all beneficial purchasers whose Viatron securities were held in the name of banks, brokerage firms or other nominees during the class period. If you are a nominee which is holding or has held Viatron securities for such beneficial purchasers and have not previously supplied the name(s) and address(es) of these beneficial purchasers to counsel for plaintiffs or defendants or have not agreed to forward the Notice and Proof of Claim described below to such beneficial purchasers, please read and comply with the enclosed Notice to Nominees by July 19, 1979 so that notice of the partial settlement in these Actions can be given to the beneficial purchasers of Viatron's securities.

Any nominee may, on its own, undertake to notify directly those beneficial purchasers for whom it is acting as nominee, provided that such nominee shall agree to forward the Notice and Proof of Claim in these actions to all the beneficial purchasers for whom it is acting as a nominee.

REQUIREMENT TO FILE PROOF OF CLAIM FORM

If you are a class member, and have not previously requested exclusion, you have to complete, sign and file the annexed Proof of Claim form in order to participate in the settlement and receive your proportionate share of the net settlement funds. The Proof of Claim form must be mailed by first-class mail, postmarked on or before October 3, 1979 in order to be timely filed. YOUR CLAIM MAY BE REJECTED IF NOT POSTMARKED BY OCTOBER 3, 1979.

If you do not file a claim form you will not receive any portion of the settlement fund, but you will be bound by the final judgments dismissing the Actions, and the Stipulation of Settlement, and you will be barred from any further assertion of released and settled claims. *To receive a portion of the settlement fund you must file a Claim Form in proper manner and mail it, by first class mail, postmarked on or before October 3, 1979.*

* * *

Dated: July 5, 1979.

Entered by Order of

HONORABLE JOSEPH L. TAURO
United States District Judge
For the District of Massachusetts

HONORABLE GEORGE F. McGRATH
Clerk
The United District Court for
The District of Massachusetts

MILBERG WEISS BERSHAD & SPECTHRIE
One Pennsylvania Plaza
New York, N.Y. 10001

(212) 594-5300

September 12, 1979

BY HAND

HONORABLE JOSEPH L. TAURO
U.S. District Judge
John W. McCormack Post Office
and Courthouse
Boston, Mass. 02109

Re: Viatron Computer Systems Corporation
Securities Litigation
No. MDL-138-T

Plaintiffs' Fourth Report to Court
Concerning Efforts to Identify
Beneficial Purchasers of Securities

Dear Judge Tauro:

Your order of May 7, 1979 scheduling a hearing on the proposed partial settlement with the underwriters provided that plaintiffs' counsel was to periodically report to the Court on their efforts to identify and provide notice to beneficial purchasers of Viatron securities. This letter will constitute plaintiffs' fourth report to the Court with respect to the efforts plaintiffs' counsel have taken pursuant to the order.

Since our last report we have received an additional 12 responses from nominees who either supplied us with the names of certain beneficial purchasers or stated that they would forward copies of the notice to their beneficial purchasers. An aggregate of 600 persons have been identified

as possible class members as a result of these 12 responses. Notice of the settlement and proof of claim form have been forwarded to these persons.

* * *

So far, we have thus identified approximately 4,600 persons who were not record purchasers but for whom others acted as nominees in the purchase of Viatron securities. Notice and proof of claim forms have been mailed to such persons. Our efforts are continuing.

Respectfully submitted,

MILBERG WEISS BERSHAD & SPECTHRIE

By JARED SPECTHRIE

MOULTON & LOONEY

By STEPHEN MOULTON

cc: All Counsel on
Viatron Service List

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE VIATRON COMPUTER SYSTEMS CORPORATION LITIGATION	M.D.L. #138
DAVID STEWART, ET AL., *Plaintiffs,* — against — EDWARD M. BENNETT, ET AL., *Defendants.*	CIVIL ACTION No. 71-3022-T
JULES SANDERS, ET AL., *Plaintiffs,* — against — EDWARD M. BENNETT, ET AL., *Defendants.*	CIVIL ACTION No. 73-2594-T

WHEREAS, the plaintiffs in each of the five above actions ("the Actions") have entered into and filed a Stipulation of Settlement dated November 29, 1978 ("the Stipulation") conditionally settling and compromising these actions as between the plaintiffs in the Actions, the class defined in paragraph (p) of the Stipulation, and the Managing Underwriter (defined in paragraph (i) of the Stipulation) on behalf of the Underwriters listed in Schedule A attached to the Stipulation; and

* * *

NOW, THEREFORE, after considering the Stipulation, the papers filed by the parties, the arguments of counsel and the entire record herein, and upon due deliberation, it is

ORDERED, ADJUDGED AND DECREED as follows:

1. The Stipulation is hereby approved and adjudged by the Court to be fair, reasonable and adequate, and the parties to the Stipulation are directed to consummate all of the terms and provisions of the Stipulation.

2. The Actions, including the claims asserted by R. Robert Popeo against the Underwriters (as defined in paragraph (1) of the Stipulation) in the *Stewart* Action be, and the same hereby are, dismissed as against the Underwriters with prejudice on the merits and without costs.

3. The Underwriters (as defined in paragraph (1) of the Stipulation) be, and the same hereby are, released and discharged from any claims, demands, causes of action and liabilities which the plaintiffs in the Actions, Channing Management Corporation, or any class member has, or may have, arising out of or relating to any transactions or occurrences set forth or referred to in the complaints in the Actions.

* * *

13. The Court hereby determines, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay and directs that this Order and Final Judgment be entered by the Clerk of the Court.

* * *

Dated: Boston, Massachusetts
August 15, 1979

JOSEPH L. TAURO, U.S.D.J.

ENTERED:

ELLEN M. HAYS,
Deputy Clerk of the Court